Before the
Federal Communications Commission
Washington, D.C. 20554

In re MARITIME COMMUNICATIONS/ LAND MOBILE, LLC, DIP ("MCLM"):		
Application for New Automated Maritime Telecommunications System Stations (2006) and Competing Auction Applications of Law Bidders		FCC File No. 0002303355
Form 603 with Admitted Control & Ownership		[Required but not filed]
Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing (2011)		FCC 11-64; EB Docket No. 11-71; File No. EB-09-IH-1751; File Nos. 0004030479, 0004144435*
Applications to Modify & Partially Assign License WQGF318 to So. California Regional Rail Authority		File Nos. 0004153701, 0004144435
Application to Assign Licenses to Choctaw Holdings, LLC (real party, Choctaw Telecommunications LLC		File No. 0005552500; WT Docket No. 13-85
Applications to Extend, Renew Geographic Licenses		File Nos. (within above)
Applications to Extend, Renew Site-Based Licenses		File Nos. 0004738157, 0005531455 (and within matters above)
MCLM Request for "Second Thursday" Relief		File Nos. (within above)
MCLM-Depriest Request for "Second Thursday" Relief (MCLM with Donald DePriest)		File Nos. (within above)
Various MCLM Assignment Applications		DA 17-26: File Nos. 0001082495-2548, 0002303355, 0003796473, 0004030479, 0004136453, 0004193028, 0004315013, 0004430505, 0004507921, 0004636537, 0004604962, 0004738157, 0005224980, 0005531404-57, 0006446692

REQUEST FOR STAY
AND
REQUEST FOR ARBITRATION

To: Office of the Secretary
Attn: Chief, Wireless Telecom Bureau

Warren Havens, and Polaris PNT PBC
2649 Benvenue Ave, Berkeley CA 94704
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July 27, 2017

* And 0004193028, 0004193328, 0004354053, 0004309872, 0004310060, 0004314903, 0004315013, 0004430505, 00044317199, 0004419431, 0004422320, 0004422329, 0004507921, 0004153701, 0004526264, 0004636537, 0004604962.

Contents

Introduction

On July 21, 2017, Warren Havens and Polaris PNT PBC (the "Petitioners" herein, who submit this Request for Stay) submitted a supplement to their January 18, 2017 petition for reconsideration (called the "Petition-1" in the filing) of the Commission's Order on Reconsideration and Memorandum Opinion and Order, FCC 16-172 (or the "Second Thursday Order")[1] which restated, referenced and incorporated various subsequent Petitioners' petition challenge pleadings involving the interdependent matters captioned above (the "Challenges") (the "Restatement and Supplement").

In the Restatement and Supplement, Exhibit 2, pp. 4-6, Petitioners present to the US District Court (in MCLM bankruptcy case appeals) facts regarding how the interdependent FCC decisions subject of the Challenges (the "MCLM Decisions") becoming "final" and no longer subject to any pending challenge is a threshold condition in the Bankruptcy Court's order accepting the MCLM-Choctaw chapter 11 Plan (the "Plan" and "Plan Order") (the "Finality Condition"), which is the basis upon which MCLM and Choctaw have proceeded to seek and have obtained the MCLM Decisions.

In the Restatement Supplement in Exhibit 2, on page 2, Petitioners described to the Bankruptcy Court in the MCLM case that they plan to see seek a stay from the FCC of matters captioned above.

In accord, Petitioners submit this Request for Stay (the "Request for Stay" or "Request").

Petitioners also submit below an alternative request for certain *arbitration* accompanied by a stay, and set forth a framework for *settlement discussion in arbitration.*

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[1] *31 FCC Rcd 13729*

Request for Stay

Petitioners request under FCC rule §1.43 (and rules cited therein including §§ 1.106(n) and 1.102(h)) that the FCC Wireless Bureau (or if the Commission, if the Bureau refers this Request to the Commission or the Commission otherwise processes this Request):

(i) Issue a stay of the effectiveness of all of the Commission and FCC delegated-authority decisions and orders in the matters captioned above subject of Petitioners' challenges described in the Restatement and Supplement (the interdependent "MCLM Decisions"), until those MCLM Decisions are "final" and no longer subject to any pending challenge before the FCC or United States Court with jurisdiction as to review, appeal, writ, injunctive, or other form of relief that could affect the MCLM Decisions, which is a threshold condition in the Bankruptcy Court's order accepting the MCLM-Choctaw chapter 11 Plan (the "Plan" and "Plan Order") (the "Finality Condition");

— and in addition, or at minimum in the alternative to '(i)' above —

(ii) Issue a stay or injunction that Choctaw and MCLM may not dispose of (including by any sale) or make use of (other than as may be permitted under the "Jefferson Radio" "doctrine") any of the AMTS geographic and site-based licenses captioned above[2] (the "Licenses") until the Finality Condition is satisfied.

Case Factors Supporting Grant

The case factors supporting grant of the Request for Stay are the following "Case Factors"):

1. Petitioners, in their Challenges pleadings, have clearly demonstrated legal standing to make and pursue the Challenges (further discussed below);

[2] These are the AMTS geographic and site-based licenses issued to MCLM that remain listed as valid as of the date of this Request for Stay.

2. Petitioners, in their Challenges pleadings, clearly show good cause to grant relief requested to reverse or materially change the MCLM Decisions (*these pleadings, all in FCC public records on ULS and ECFS, are referenced and incorporated in full herein*);

3. Petitioners, in the court pleadings, have clearly shown the US Courts handling and governing the MCLM bankruptcy (the US Bankruptcy Court, and the overarching US District Court, in Northern Mississippi)[3] that the MCLM-Choctaw Plan and Plan Order requires the Finality Condition (see above)[4] (*these relevant court pleadings are part of the Challenges pleadings before the FCC: see '2' immediately above*);

4 The Finality Condition has not been met, including due to the pending Challenges (*see the Challenges pleadings*);

5. The FCC "Second Thursday" "doctrine" or "policy"[5] — (even if it may lawfully be applied to grant relief to a licensee that obtained licenses in an auction by cheating to outbid the lawful high bidders, directly against Congressional mandates and FCC rules, which Petitioners vigorously dispute in the Challenges) — is based on the FCC waving or not pursing

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[3] Petitioners have standing in the MCLM bankruptcy proceedings in these two courts, as parties in interest, for the same reason they have standing in the Challenges before the FCC, as they have presented to those courts. See, e.g., the attachments to the Restatement and Supplement.

[4] The Plan has text describing the finality requirement with regard to the needed FCC decisions (the "MCLM Decisions" defined herein). This description, including in the "definitions" in the plan, sets forth the well-known standard in litigation which applies in FCC adjudication matters. It is summarily noted by the Third Circuit in *Council Tree v FCC*, 503 F.3d 284 (2007):

> An agency order is non-final as to an aggrieved party whose petition for reconsideration remains pending before the agency. *West Penn Power Co. v. EPA*, 860 F.2d 581, 583 (3d Cir. 1988).

As "aggrieved party" is described in the Challenges pleadings' standing sections by reference to authorities including 47 USC 402(b) and *FCC v Sanders,* 309 U.S. 470, and the Commission decision on standing that cited to *Sanders*. Thus, because the Challenges are pending. the MCLM Decisions are *non-final* approval orders of the FCC.

[5] The Second Thursday Order is interdependent with the other MCLM decisions, as the all indicate or show.

its regulatory duties in deference to relief under US bankruptcy law, in bankruptcy proceedings of a subject FCC licensee (if various conditions are met).

Here, unless a stay is issued as requested by this Request for Stay, any "Second Thursday" relief will contravene, not support, the bankruptcy relief at issue, due to the Finality Condition noted above, and it will also lead to inefficiencies in final sound resolution of the matters at issue in the MCLM Decisions and Challenges. [6]

6. As shown and argued in the Challenges, MCLM's geographic licenses are *void ab intio* including because their initial grant, and subsequent extensions and renewals grants, were *ultra vires*,[7] directly contrary to requirements of the relevant FCC rules and underlying Commission rulemaking (e.g., regarding rule sections §§ 1.2105, 1.946, 1.955, etc.) and the Congressional mandates behind those rules including in 47 USC §309(j).

7. Other reasons that support grant of this Request, but are not needed for grant, and are shown in the history of the MCLM Decisions and Challenges.[8]

Stay Relief Standard

The Third Circuit Court of Appeals explained the standard for a stay, in issuing the stay requested by Prometheus of FCC No. 03-127 (Exhibit 1 hereto)[9]:

> We consider four factors in determining whether to grant the motion to stay: (1) the movant's likelihood of success on the merits; (2) whether the movant will

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[6] Petitioners maintain, and by this filing do not waive, their position that MCLM deserves no bankruptcy-related relief of any sort, or that their bankruptcy is for a valid bankruptcy purpose in the first place. The MCLM bankruptcy *purpose* testified to by Sandra Depriest at the Plan confirmation hearing (Havens was present, and this is shown in the transcript) *was to get FCC "Second Thursday" relief* which Petitioners assert is *not* among the valid purposes for *any* bankruptcy. Petitioners maintain their argument presented to the FCC in their Challenges regarding this invalid purpose, and that due to this invalid purpose, the FCC cannot grant any bankruptcy related relief. The FCC did not deal with this argument, and Petitioners allege this alone renders the Second Thursday Order defective.

[7] Appendix 1 below describes further some of the ultra vires actions.

[8] Petitioners may supplement this Request. Also, see Endnote after the Appendixes below.

[9] Order granting stay, 8/22/03, in case no. 03-3388, *Prometheus v FCC*.

> suffer irreparable harm if the request is denied; (3) whether third parties will be harmed by the stay; and (4) whether granting the stay will serve the public interest. E.g., *Susquenita Sch. Dist. v. Raelee,* 96 F.3d 78, 80 (3d Cir. 1996); *In re Penn Cent. Trans. Co.,* 457 F.2d 381, 384-85 (3d Cir. 1972)

(the 'Legal Standard" and the "Legal Standard Factors"). This Legal Standard and these Legal Standard Factors also apply in the case of this Request for Stay.

The Standard is Met

The Stay Request should be granted because the Legal Standard is met given the Case Factors presented above: Following the above-listed Legal Standard Factors:

(1) Petitioners, the movants, are likely to succeed due the Case Factors including 3, 4, 5 and 6.

(2) If the Stay is not granted, then, as shown in the Challenge pleadings: (i) Petitioners will suffer irreparable harm (shown in the Challenges pleadings, including in their Standing sections), (ii) the Congressionally mandated public interest purposes in 47 USC §309(j) as to both (a) competitive bidding behind the Licenses and (b) construction-service requirements and deadlines, will also suffer irreparable harm, as also shown in the Challenge pleadings,[10] and (iii) the bankruptcy Plan and Plan Order will also be corrupted and irreparably harmed, by premature FCC relief in the MCLM Decisions, in conflict with the Plan and Plan Order — (even if, which Petitioners vigorously dispute before the FCC and in the MCLM bankruptcy case, MCLM and Choctaw, its funders from the start, deserve any relief at all)— including since MCLM-Choctaw seek that the Plan be deemed "effective" with an "effective date" based on these premature FCC MCLM Decisions (see the Restatement Supplement, Exhibits 2 and 3), in order to assert that actions challenging such "effective" plan actions,

[10] See *e.g.,* Petitioners' *Errata And Supplement Copy, Reply To Opposition To Petition For Reconsideration...* filed July 17, 2017 (under File Nos. captioned above including 0005552500), pp. 2 and 4.

including the assignment of the licenses to Choctaw and sales or other dispositions by MCLM or Choctaw of the Licenses to other parties cannot thereafter be challenged, based on "equitable mootness" and/ or other policies or arguments under bankruptcy law (if such third parties meet required criteria). The FCC should not have its US-Communication-Act processes, policies and decisions abused and misused by MCLM and Choctaw, in US bankruptcy and district courts, in these ways in order to, in turn, abuse and misuse US-Bankruptcy-Act processes, policies and decisions.

(3) For reasons given above, third parties cannot be harmed, but their lawful interests will be protected by grant of the requested Stay. Also, there are no parties involved in the Challenges and MCLM Decisions but for Petitioners and MCLM-Choctaw— whoever are the real parties in control of those and behind those: The sole stated person in control of MCLM, Mrs. DePriest, has never submitted the required transfer of control application, from her to the admitted-to controlling interests; or filed any required accurate, current Form(s) 602 for MCLM, or required yearly designated entity reports.

In this regard, another reason for grant of a stay is so that MCLM files all those required filings (and attempts relief needed for the tardy filings), and so that the required disclosures in those filings are considered in proper decisions on the Challenges in reconsideration of the FCC MCLM Decisions.

(4) For reasons given above, the public interest will be protected by grant of the requested Stay, including but not limited to (i) upholding the public interest mandates in §309(j) and other relevant parts of the Communications Act, and the meaning and purpose of the various relevant FCC rules (in part cited above, and shown in the related Commission rulemaking

decisions), and secondarily (ii) upholding integrity of the subject MCLM-Choctaw bankruptcy proceeding and related bankruptcy law and purpose. [11]

Standing

Petitioners' standing should not be in dispute by MCLM (with Choctaw). Petitioners assert that MCLM frivolously asserts that Petitioners lack standing, to avoid the substance of the Challenges under which MCLM shows no credible defense, and to artificially burden and divert Petitioners from presentations of the substance.

Petitioners have standing to submit this Request, including for the same reasons that they have standing in the shown in the sections on "standing" in the Challenges pleadings, referenced in the Restatement and Supplement. Those sections are referenced and incorporated herein. Consistent and additional demonstrations of standing are also submitted below.

Initially: Havens has standing (and thus Polaris also has standing as a partial assignee of certain Havens's interests giving him standing) for the following reason, clear in FCC case precedent *and effectively conceded* by MCLM (and FCC staff).[12] MCLM in opposing Petitioners' assertions of standing-- and FCC *Division* staff in some of the recent MCLM Decisions (but *not* others such as the December 2016 Second *full-Commission* Thursday Order that lists Havens as a party in the present tense)-- *do not dispute* (and cannot dispute, since it is easy to see and prove otherwise in FCC and California Court records) that Havens remains holder of major ownership (as he positively asserts in the Challenges pleadings) in the FCC licensee companies (including those holding AMTS licenses in the same markets as the subject

[11] However, again, Petitioners maintain their allegation that MCLM has no legitimate bankruptcy purpose to start with. See footnote 6 above. Thus, Petitioners presentation of bankruptcy related purposes is in the alternative: even if valid bankruptcy are deemed to exist.

[12] The matters of this paragraph are in Petitioners' Challenges pleadings, from the time MCLM and some FCC staff asserted Petitioners do not have standing. However, additional case precedents are presented here.

MCLM Licenses) that are listed as parties in the OSC HDO FCC 11-64 that commenced proceeding 11-71 that in turn lead to proceeding 13-85 (to handle the MCLM "Second Thursday" relief request and related matters). In this regard, the full Commission explained in *In the Matter of Ronald Brasher et al.*, FCC 00-314 (underlining added):

> The test for determining whether an individual is a real-party-in-interest in an application is whether that individual "has an ownership interest or is or will be in a position to actually or potentially control the operation of the station." *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 427 (Rev. Bd. 1983).

A party in interest in a FCC licensing matter has standing in that matter and in any other FCC licensing (or other) proceeding that affects that party's interests, for any reason among those listed in 47 USC §402(b) including the most-broad category: an aggrieved party as discussed by the US Supreme Court in the *FCC v Sanders* case (see above footnote 4). Thus, MCLM (and Choctaw) and FCC Division staff, effectively concede that Petitioners have standing, for the preceding reason alone.

Further, this already-shown standing, further discussed herein, also includes that MCLM has challenged, and maintains the challenges of, Havens licensee character and licensing actions before the FCC ("MCLM Havens Challenges"). The MCLM Havens Challenges involve many years and hundreds of Havens license actions (and before the MCLM Havens Challenges, Mobex, the MCLM co-managed[13] predecessor and affiliate, challenged Havens in all his site-based AMTS license actions, after representing it would not do so). These MCLM Havens Challenges extended and still extend to Havens's licensing actions in 220 MHz spectrum, and low-band "Paging" spectrum, in which MCLM held no FCC licenses or license applications, yet

[13] John Reardon is co-managing person in MCLM-Choctaw, and in Mobex. He is among the wrongdoers in the FCC "Second Thursday" relief matter that is the gravamen of the MCLM bankruptcy, and he filed a claim for a major sum in that bankruptcy. He is not an "innocent" creditor or party. The FCC did not make findings needed as to *any* "innocent" creditors or parties (see above).

asserting standing challenge right and it got the FCC to substantially grant its positions against Havens. Havens has legal-standing rights to defense of the MCLM Havens Challenges, including by and in his Challenges against MCLM. The MCLM Havens Challenges also subject the MCLM claims that Havens lacks standing in the Challenges to *judicial estoppel*[14] because under the MCLM-Havens-Challenges' standards of legal standing rights, Havens has standing in the Challenges of MCLM. (Also, applying judicial estoppel to the MCLM-Havens-Challenges' legal arguments on license-construction extensions, the MCLM Licenses extension requests, captioned above, fail.)

MCLM also continues to oppose Havens' appeal filings regarding the Sippel Order, FCC 15M-14, where MCLM supports the FCC finding that Havens lacks character and fitness to be a Commission licensee, and MCLM has also requested in several filings that the FCC investigate Havens and find he lacks character and fitness based on allegations asserted by Arnold Leong.

In addition— besides assiduous "straw-man" misstatements to falsely allege that Havens and Polaris did not show current standing— their suggestions or indications that Havens lost or waived standing, and did not have it at the right times, and does not have standing if not earlier shown, are also incorrect including since: (i) "`[T]he necessary requirement is for …plaintiff to have standing at the time the litigation is filed.'" *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978) quoting Thurston v. Dekle, 531 F.2d 1264, 1269-70 (5th Cir.1976)), cert. denied, 439 U.S. 835 (1978); see also *Sosna v. Iowa*, 419 U.S. 393, 402, 95 S.Ct. 553, 558-59, 42 L.Ed.2d 532 (1975);[15] (ii) "[s]tanding, whether constitutional or prudential, is a jurisdictional

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[14] The same applies to the FCC having permitted MCLM, Mobex, their affiliates and others to challenge Havens for decades, and processing those challenges (and some are still pending in administrative review actions), where those challengers held no licenses or license applications in the same radio service and market, without dismissal and requiring extensive time and expense by Havens in response.

[15] Havens has standing at all relevant times, including when the subject FCC administrative "litigation" actions challenging MCLM and the subject Licenses were filed.

issue which cannot be waived or conceded." *Animal Legal Defense Fund, Inc. v. Espy,* 29 F.3d 720, 723 n. 2 (D.C.Cir.1994) (citing *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 498 (D.C.Cir.1994); id. at 504 (Williams, J. concurring in p*art and dissenting in part); Mallick v. International Bhd. of Elec. Workers*, 749 F.2d 771, 773 n. 1 (D.C.Cir.1984)); and (iii) a party can supplement the record during a proceeding to establish standing. See *National Wildlife Fed'n v. Burford*, 878 F.2d 422 (D.C.Cir.1989) ("The law of this circuit allows plaintiffs to supplement the record to cure alleged defects on standing.") (citing *National Wildlife Fed'n v. Hodel,* 839 F.2d 694, 703 (D.C.Cir.1988), and *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)).

Havens also has standing since MCLM continues to challenge Havens character and ability to act before the FCC in licensing matters, and against MCLM as indicated in the standing sections of the Challenges pleadings, and further discussed in the Endnote below.

Further, the lack of standing *incorrectly* asserted by MCLM (and the FCC Division) is due to unlawful, prejudicial action by MCLM (and the FCC) and thus cannot equitably be applied, as the Challenges pleadings discuss. See also Appendixes and Endnote below.

FCC Arbitration

As an alternative to grant of a stay as requested above, Petitioners submit that the FCC instruct the parties to undertake arbitration under relevant FCC rules and precedents, and issue a stay, described above, until completion of the arbitration, and then determine if any further stay is warranted.

Havens has in mind a settlement position in formal arbitration, under a suitable confidentiality protective agreement, indicated in Appendix 4 below. This is consistent with his general descriptions to the FCC, including of future technologies and systems he and Polaris are pursuing. The position is designed as a “win-win-win” for all parties and for the public interest in the Communications Act and other federal law.

FCC rule 47 CFR 1.18[16] authorizes and encourages arbitration:

> § 1.18 Administrative Dispute Resolution.
>
> (a) The Commission has adopted an initial policy statement that supports and encourages the use of alternative dispute resolution procedures in its administrative proceedings and proceedings in which the Commission is a party, including the use of regulatory negotiation in Commission rulemaking matters, as authorized under the Administrative Dispute Resolution Act and Negotiated Rulemaking Act.
>
> (b) In accordance with the Commission's policy to encourage the fullest possible use of alternative dispute resolution procedures in its administrative proceedings, procedures contained in the Administrative Dispute Resolution Act, including the provisions dealing with confidentiality, shall also be applied in Commission alternative dispute resolution proceedings in which the Commission itself is not a party to the dispute.

§1.18(b) applies in this case, but in addition Petitioners assert that §1.18(a) also applies because (i) Petitioners challenge not only MCLM-Choctaw but the subject FCC MCLM Decisions including on the basis that the FCC *ultra vires* rule change, above (regarding auction application, bidding and licensing qualifications) underlies the FCC MCLM Decisions, and (ii) in addition, Petitioners have asserted in their Challenges pleadings that the FCC staff actively supported MCLM against Havens and the Commission's OSC HDO FCC 11-64 (which Havens was prosecuting for the Commission, and in fact substantially succeeded with), as ALJ Sippel noted at the start of the evidentiary trial in proceeding 11-71 (which is far beyond neutral or even non-neutral "prosecutorial discretion").

The Act referenced in FCC rule §1.18, 5 U.S. Code Subchapter IV - Alternative Means of Dispute Resolution in the Administrative Process, includes the following:

> 5 U.S. Code § 575 - Authorization of arbitration
> (a) [….]
> (3) An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.

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[16] See also: 9 FCC Rcd 6513: "§22.135 Settlement conferences…. apply to… contested proceeding….to use alternative dispute resolution procedures… See…7 FCC Rcd 2874." under 1.18(a)-(b).

However, obtaining extraordinary relief from rules and procedures is not "obtaining a benefit" under them.[17] This applies the the MCLM Decisions and the Challenges, including, *inter alia,* the *ultra vires* and void actions listed in Appendix 1 below. The FCC has ordered arbitration in the context of granting special licensing relief and conditions, *e,g.,* see Appendix 2 below, and it may do so in this pending case of the Challenges to the interdependent MCLM Decisions.

That may also be the most efficient and prompt resolution, for FCC staff efficiency and for purposes of the MCLM bankruptcy action, at least if the FCC itself participates.

Petitioners have explained in their Challenges pleadings, including this year, that in the circumstances MCLM and the FCC have created, Petitioners have rights to sue in a US District Court, for injunctive, declaratory and damage relief, due to the ultra vires nature of the FCC MCLM Decisions excessive delay (e.g., see Appendix 3 below) and other good cause, but Petitioners are further attempting relief before the FCC, and they also suggested FCC arbitration, as again noted above. Some authority supporting Petitioners' rights to seek such relief before a District Court are given in Appendix 3 below.

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[17] See 5 USC §551 definitions, in relevant part (emphasis added):

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement …services [. . . .]
>
> (11) "relief" includes the whole or a part of an agency— [….] (B) recognition of a… exemption, or exception;….

Conclusion

For the reasons given, the relief requested should be granted.

Respectfully submitted,

July 27, 2017,

/s/

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Warren Havens

Warren Havens, an Individual
Warren Havens, President, Polaris PNT PBC

Contact information is on the Caption page.

Declaration

I, Warren Havens, declare under penalty of perjury that the foregoing filing including the appended materials were prepared pursuant to my direction and control and that the factual statements and representations therein known by me are true and correct.

/s/

_____

Warren Havens

July 27, 2017

Appendix 1

Sufficient partial summary list of MCLM-instigated FCC actions constituting and resulting in the "MCLM Decisions" (defined above and indicated in the caption above) that Petitioners have shown violate Congressional mandates and are *ultra vires and void* (and otherwise unlawful), and that give rise to rights of action in a US District Court (see Appendix 3 below)

The following are subject of the pending Challenges, and the MCLM Decisions, and, among other reasons, provide good cause for a suit in a US District Court discussed in the text above and in Appendix 3 below.

(1) The Auction No. 61 *ultra vires* rule change (see above—allowing, after the short-form deadline, a bidder to go down in bidding credit (and in MCLM's case where it was based on cheating and misrepresentations), which the Commission expressly said was major and disqualifying in its relevant rulemaking order, and as stated in the rule) with no waiver granted, to obtain the geographic licenses in Auction 61 over the claims of the lawful high bidders (interests now held by Petitioners)— then extended to all auctions after Auction 61, violating Congressional mandates in 47 USC §309(j).

(2) MCLM admitted that its controlling interests were not or not solely Sandra Depriest, but was or included Donald Depriest, and in its bankruptcy after the Chapter 11 Plan was approved by the court, including Choctaw— but the actual *de jure* and *de facto* controlling interests were never submitted to the FCC for approval and did not receive approval (separately listed below). Thus, the "MCLM" that participated in the actions leading to the MCLM Decisions was not authorized, and not identified as required by its controlling interest. Licenses subject to deliberate extended unauthorized transfer of control, as here (especially where that prejudices others, as here the Petitioners), are void under 47 USC §310(d) and case precedents, and parties responsible are subject to sanctions.

(3) The second-bite "Second Thursday" "doctrine" or "policy" in the Second Thursday Order in late 2016, is far outside that "doctrine" and contrary to Congressional mandates in 47 USC §309(j) that also was a several-year-late new request (see above).

An agency cannot avoid its regulatory duties to benefit parties that violate agency law and who seek to launder the violation under other law including bankruptcy law, in violation of Congressional mandates governing the agency and rights of parties that complied with its law— as the FCC has done here for MCLM-Choctaw and its self-proclaimed "innocent creditors" that actually funded the violations throughout its course.

Also, the Second Thursday Order alleges to recognize sufficient "innocent creditors" because Choctaw said that the bankruptcy court said so, but (i) that is false: that court specifically said and wrote it would not make determinations related to any FCC Second Thursday (or other) matter (that is not in its jurisdiction), and it is also clear that the major creditors are not "innocent" but funded the wrongdoing and wrongdoers where the facts of the wrongdoing were publicly available in the public FCC ULS records of MCLM (including in admissions and in the Challenge pleadings of Petitioners), and (ii) "innocence" under the FCC "Second Thursday" "doctrine" is not a matter of bankruptcy law and for bankruptcy courts, but of FCC law (involving the subject FCC law violations, and who took part in, or knew of and

proceeded under the violations) and only the FCC staff can determine that, which they did not do. ALJ Sippel, at MCLM request, stayed the 11-71 fact finding proceeding on those matters (and even allowed Choctaw to escape all discovery), and no other FCC staff took on that fact finding.

The Second Thursday Order also ignored the impermissible windfall gains to Choctaw-MCLM by allowing them to keep all of the Licenses, valued at far higher than the purported innocent debt, as the Commission itself noted in its *MO&O,* FCC 14-133, rel. September 11, 2014: This MO&O denied the only "Second Thursday" request from and controlled by MCLM: the second request in the name MCLM was actually based on Donald Depriest's alleged-valid personal bankruptcy. Mr. Depriest's debt to Mr. Phillips was shifted to MCLM, and then subject to FCC "Second Thursday" relief.

(4) The geographic licenses-extension waiver grants that are directly contrary to the non-waiver rules in §1.946(e)(2)-(3) and the Bureau's recent Public Notice, *DA 17-573* Rel. June 12, 2017, and requirements of 47 USC §309(j).

(5) The "footnote 7" new "doctrine" relief that first appeared in FCC 11-64 with no public notice and comments required in 5 U.S. Code § 553, and also at odds with 47 USC §309(j), then effectively extended, undercutting its self-justifying narrow exceptions, in the Second Thursday Order regarding self-described "critical" service companies.

This is also a violation of Fifth Amendment rights to due process in government takings: the rights of the lawful high bidders to subject license granted under this "footnote 7 doctrine" to a public railroad, were deprived of all rights, with no due process and compensation. Under this *ultra vires* doctrine, the FCC can take any license if it finds that a public agency seek it for a "critical" purpose, even where the record is clear that it has various other options, and can act contrary to the mandates of 47 USC §309(j) regarding licensing by competitive bidding.

(6) Pretextual *ultra vires* removal of Havens from proceeding 11-71, and threats on qualifications of Havens and related licensee companies (most not even active in this proceeding). The unlawful components and background includes:

- Grant of unlawful benefits to MCLM and its counsel at the FCC Enforcement Bureau (and unlawfully benefit others, thereafter) based on a perverted paraphrase of rule §1.251(f)(3) (adding and deleting key words to change the meaning and effect of the rule).

- An alleged violation that was demonstrably approved by the Administrative Law Judge ("ALJ") Richard Sippel (an alleged unauthorized motion for summary decision that was specifically authorized).

- This actual rule, §1.251(f)(3), was never placed on public notice for comment, as required under the Administrative Procedure Act and FCC rules, rendering it void.

- Alleged years disruption of the proceeding that the ALJ in fact accepted, and often approved and that was the basis of the major decisions for years.

- The record is clear that it was MCLM that delayed the hearing by, *inter alia*, admitted destruction of scores of boxes of the most relevant evidence;

- The ALJ and EB *refused* to take this evidence when Havens found it at high cost under an Order from that ALJ that he do just that; MCLM's fraudulent assertion of scores of licensed stations nationwide eventually admitted as not existing and terminated (only due to Havens persistence in this proceeding); and discovery delays and other abuses; and with no sanctions even suggested by the "Enforcement" Bureau or the ALJ, entirely avoiding requests by Havens;

- The ALJ, with support of MCLM, rejected timely filed major pleadings by Havens, even those submitted days in advance, on the pretext that they had to be submitted on ULS prior to midnight. When this error was shown, the ALJ affirmed the rejection.

- Unlawful invasion of attorney-client protection rights (separately listed below);

- Substantially in secret discovery, contrary to law, including by improper redactions and use of a so-called protective order, and unlawful withholding under FOIA requests by Havens (separately listed below).

- In this proceeding (also separately listed above), MCLM admitted that its controlling interests were not or are not solely Sandra DePriest, but was or included Donald DePriest, and in its bankruptcy after the Chapter 11 Plan was approved by the court, including Choctaw— but the actual *de jure* and *de facto* controlling interests were never submitted to the FCC for approval and did not receive approval (separately listed below), and thus, the "MCLM" that participated in the hearing was not authorized and not identified as required by its controlling interests. That is, the FCC granted so-called "Second Thursday" relief without knowing the real parties in interest in MCLM, and without that determination, the FCC could not determine if any of the granted relief was in the public interest.

- In this 11-71 proceeding, an essential party was Choctaw, but the ALJ allowed it to escape all discovery and other obligations, but it was allowed to obtain participation benefits.

- Staying the second phase of the 11-71 hearing based on MCLM and Choctaw request for so-called Second Thursday relief. The FCC allowed Choctaw to request Second Thursday relief, along with MCLM, and granted their joint request, even though Choctaw holds no FCC licenses in its name, and thus by MCLM's own arguments and the FCC's own positions, Choctaw had no standing, but the FCC still dealt with Choctaw and its filings over the last 6 years. Choctaw had less claim to MCLM's Licenses than the lawful high bidders at auction 61.

- The ALJ unlawfully rejected Havens' right to self representation in this 11-71 proceeding. Eventually under Havens persistence, this was permitted conditioned upon a showing by Havens, however, such a condition is contrary to FCC rules, the Administrative Procedure Act, and due process protected by the Fifth Amendment, and was not a condition set by the Commission in the OSC HDO FCC 11-64 that commenced this hearing, and in which Havens was designated as a party (to co-prosecute the case set forth in FCC 11-64). Also, the ALJ barred Havens attempts to participate in pre-hearing conferences as a party, by not allowing him to present arguments, or at times relevant facts, and eventually not allowing his participation by telephone, the only practical means given his residence in California.

- Eventually, the ALJ, for benefit of MCLM and its counsel at the FCC Enforcement Bureau (FCC EB legal counsel presented MCLM's case in the 11-71 hearing), issued the above noted order, on pretexts removing Havens and calling into question his qualifications, as an

interlocutory order, which Havens directly and via legal counsel timely appealed. Yet, the FCC has sat on the appeals for over two years,[18] where the principal of an appeal of an interim order is to get prompt decision, so the course of the hearing can be determined. Here, the FCC (ALJ Sippel as to the petition for reconsideration, and the Commission as to the interlocutory appeals) has delayed for over two years, and yet has not suspended the hearing while the appeals of this interlocutory order is being sat on by the ALJ and Commission. And the FCC, MCLM and others have used this as a pretext to support a receivership that took control from Havens of licensee companies and rights he held, granting further unlawful benefit to MCLM and to protect the Enforcement Bureau and others in the FCC that engage in the unlawful actions in part summarized in this Appendix.

This was and remains a mockery of the Commission's OSC HDO FCC 11-64 and of any semblance of a lawful proceeding under the requirements of Fifth Amendment due process, the Administrative Procedures Act, and the Communications Act.

The reasons for this should be subject of an evidentiary hearing with discovery in a US District Court. See Appendix 3 and the Endnote below.

(7) The MCLM's admitted extensive destruction of evidence and its fraud for alleging as valid, nonexistent nationwide site-based licenses, both criminal under USC Title 18, including 18 USC §1519 is protected by the FCC staff.

(8) The decades of FCC neglect, and Fifth Amendment due-process equal-treatment violations, of not applying the threshold *sine qua non* AMTS rule §80.475(a)[19] requiring no-gap coverage in continuity-of-service for MCLM and its predecessor Mobex, but applying this rule to Havens who competed with Mobex-MCLM even where it did not apply to Havens who was in competition, and sanctioning Havens his attempts to get similar treatment under the FCC's rules.

(9) Close to a decade of unlawful FOIA request denials, to protect MCLM, Choctaw and Mobex, shown unlawful by seeing through some of the poor redactions, and mostly by the FCC contradicting its own exemption assertions (first, asserting exemption 4, then giving that up and asserting only exemption 7, then giving that up and going back to only exemption 4, but after several appeals of the denials, where the Commissions has found unlawful withholdings by the Enforcement Bureau who became counsel to MCLM in proceeding 11-71. Yet, the Commission still permitted the Enforcement Bureau to be the FOIA custodian of records and to decide on Havens' request, even though the Enforcement Bureau presented and defended MCLM's case for it, as its own. This *by itself* is grounds for a mistrial and new trial in 11-71 as to all of the MCLM Licenses. Petitioners are within FOIA time limits to appeal the series of FOIA unlawful denials to a US District Court, with related matters.

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[18] Even for non-interlocutory decisions involving FCC licenses, Congress has set a 90- day period as the limit for FCC actions. See 47 USC §405.

[19] We mean §80.475(a) prior to the FCC staff deletion of the above noted continuity of service coverage requirement, with no notice and comment required in 5 U.S. Code § 553, and disabling the AMTS "freeze-suspension" orders of the Commission, and signaling to Mobex and its successor MCLM that the FCC would not enforce its rules in AMTS for undisclosed reasons contrary to Congressional requirements and the public interest. This invited the other *ultra vires* actions in part listed herein and more fully described in the Challenges.

(10) Extensive impermissible ex parte communications against FCC ex parte rule prohibitions and principles, and the Administrative Procedure Act prohibitions, that are highly prejudicial to Petitioners' interest. This includes FCC staff giving, ex parte, excluding Havens, advice and information to parties competing with and adverse to Havens in restricted licensing proceedings, in FOIA proceedings, and in other matters shown in FCC records, some obtained under FOIA.

(11) Unlawful orders that Havens's legal counsel turn over to ALJ Sippel, in presence of MCLM and its counsel in the FCC Enforcement Bureau (that had taken up the MCLM case for the trial in proceeding 11-71, in part under a confidential arrangement) extensive information under attorney-client privilege, confidentiality and work product protections, resulting in loss of counsel, damages and delays.

(12) The FCC Enforcement Bureau abrogated its duties as the Commission's prosecutor under the OSC HDO FCC 11-64 and in the resulting proceeding 11-71, and instead switched sides (something that ALJ Sippel said he had never seen in his entire career) and presenting and defending MCLM's case in Docket 11-71, leaving only Havens and the companies he controlled at the time, to prosecute the case for the FCC, where Havens was denied access to (by the Enforcement Bureau and ALJ Sippel) and not allowed to use at hearing (by ALJ Sippel) relevant evidence obtained from MCLM, but improperly designated as confidenital even though most, if not all of it was public or not wanted by MCLM. And then ALJ Sippel allowing the hearing to go forward under those circumstances, and accepting MCLM's bald assertions of confidentiality, and rejecting Havens' attempts to properly get said evidence under FOIA.

(13) Other actions of like unlawful affect and delay.

/ / /

Appendix 2

Sufficient case authority regarding FCC mandated arbitration in circumstances as in this case

From *In the Matter of Comcast Corporation*, *FCC 07-172* (2007) (emphasis added):

> 3. In the Adelphia Order the Commission approved multiple license transfer applications subject to conditions designed to ensure that the transactions served the public interest, convenience, and necessity pursuant to… 310(d) of the Communications Act. n6 One of the conditions established a commercial arbitration process that may be used as an alternative to the Commission's …complaint procedures….
>
> 4. ….The arbitration is to be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules of the American Arbitration Association ("AAA")…. Further…a party aggrieved by the arbitrator's award may file a petition seeking de novo review of an award. n13….
>
> n13 Adelphia Order, Appendix B, section 4 (a). Because Comcast may seek de novo review of the arbitrator's decision by the Commission, the process is consistent with the Administrative Procedures Act and the Alternative Dispute Resolutions Act ("ADRA"), 5 U.S.C. § 575(a)(3), despite Comcast's suggestion to the contrary. See Reply at 30, n. 102. We do not find the prohibition in section 575(a)(3) of the ADRA to apply because the arbitration here is non-binding (i.e., either party may seek de novo review of the arbitration decision). Based on the structure of the ADRA, the usage of the term "arbitration" in other provisions of the ADRA to refer to "binding arbitration," and the legislative history, we believe Congress used the term "arbitration" in section 575(a)(3) to mean binding arbitration. See, e.g., 5 U.S.C. § 580 (entitled "Arbitration awards," the provision states that the award in an "arbitration" proceeding becomes final 30 days after it is served on the parties, that a final award is binding on the parties, and that it may be enforced pursuant to sections 9 through 13 of title 9, which are the enforcement provisions of the Federal Arbitration Act); 5 U.S.C. § 581(a) (provides that any person aggrieved by an award made in an "arbitration proceeding" under the ADRA may bring an action for review of that award only under the very narrow grounds of review contained in the Federal Arbitration Act, e.g., where the award was the result of corruption, fraud or undue means; where there was evident partiality or corruption by the arbitrators; or where the arbitrators exceeded their authority). See also *S. Rep. No. 543, 101st Cong., 2nd Sess.* 1990 reprinted at 1990 U.S.C.C.A.N. 3931, 3942-43 (stating that with regard to the sections of the ADRA that focus on arbitration, including what is now section 575(a)(3), the sections are "intended to be read in tandem with the Arbitration Act which is codified in Title 9 of the United States Code and which provides the statutory framework for binding arbitration in the private sector and, in many respects, in ongoing federal programs")….

/ / /

Appendix 3

Sufficient case authority regarding the right to sue in a US District Court in cases such as this case (see Appendix 1) which in turn, provides basis for FCC arbitration, as presented above

Various legal issues, raised in the Stay Request text above, are involved in the decisions discussed and cited below. Petitioners assert that the circumstances shown in the record of the Challenges and MCLM Decisions support their rights to proceed at this time in US District Court action or actions, as partly indicated below, without further "exhaustion" of attempts before the FCC, including: (1) the right to seek injunctive, declaratory and other non-damage relief, and (2) the right to seek damage relief.

Underlining emphases, and text in double brackets, added in quotations below.

From: Congressional Research Service, *An Introduction to Judicial Review of Federal Agency Action*, Jared P. Cole, Legislative Attorney December 7, 2016 (7-5700 www.crs.gov R44699):

> [….] 34/ [….] Three primary statutes waive sovereign immunity, thereby permitting lawsuits against the United States in federal court under certain circumstances.37/ First, the APA was amended in 1976 to permit individuals aggrieved by agency action to bring suit in federal court against the United States and government employees in their official capacity.38/ However, this statutory waiver does not authorize money damages as a remedy.39/ Second, the Federal Tort Claims Act (FTCA) permits suits to be heard in federal court for certain torts committed by agency employees in the course of their employment.40/ In these cases, the United States is substituted as a defendant for the employee who allegedly committed the tort.41 Unlike the APA, the FTCA permits money damages as a remedy.42/ Third, the Tucker Act permits suits against the United States for breach of contract and certain other **monetary** claims that do not arise in tort. 43/
>
> 34/ …. The application of sovereign immunity in federal courts stems from the English common law tradition, which barred suits against the Crown absent consent. *Santana-Rosa v. United States,* 335 F.3d 39, 41-42 (1st Cir. 2003) ("This notion derives from the British legal fiction that 'the King can do no wrong.'") (citing *Feather v. The Queen, 122 Eng. Rep.* 1101, 1205 (Q.B.1865))…. [. . . .]
>
> 37/ Although less relevant after the passage of general statutes waiving the federal government's sovereign immunity, the Supreme Court has held that, even absent a waiver, individuals may sue government officials for prospective injunctive relief as a result of **ultra vires** conduct. *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689- 90 (1949).
>
> 38/ 5 U.S.C. §702. Importantly, this waiver may apply to a wider range of lawsuits than are directly authorized by the APA's cause of action, such as "nonstatutory" and constitutional claims. See *Trudeau,* 456 F.3d at 187; *Puerto Rico*, 490 F.3d at 57–58 ; *Presbyterian Church (U.S.A.) v. United States,* 870 F.2d 518, 525 (9th Cir. 1989) ("On its face, the 1976 amendment is an unqualified waiver of sovereign immunity in actions

seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable."); *Hostetter v. United States,* 739 F.2d 983, 985 (4th Cir.1984); *Jaffee v. United States,* 592 F.2d 712, 719 (3d Cir.1979)….

39/ 5 U.S.C. §702.
40/ 28 U.S.C. §2679.
41/ Id. §2679.
42/ Id. §§1346(b), 2671-80.

43/ Id. §§1346, 1491; *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (noting that the Tucker Act "waive[s] sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)");…. *Burkins v. United States*, 112 F.3d 444, 449 (10th Cir. 1997) ("The Tucker Act, 28 U.S.C. §§1346, 1491, 'vests exclusive jurisdiction' with the Court of Federal Claims for claims against the United States founded upon the Constitution, Acts of Congress, executive regulations, or contracts and seeking amounts greater than $10,000.").

Cause of Action

Assuming a federal court has jurisdiction over a suit challenging an agency action, in order to challenge the actions of a federal agency, a plaintiff must also demonstrate that he or she posesses a legal right to seek judicial redress.44/ A plaintiff will have a "cause of action" if he or she "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court."45/ Various statutes explicitly provide such causes of action to enforce legal requirements against federal agencies.46/ Absent a specific statutory framework creating a cause of action, the APA provides a general cause of action for individuals aggrieved by a "final agency action" if "there is no other adequate remedy in a court."47/

There are other, less common bases for challenges to agency actions. In very limited situations, even lacking an express statutory cause of action, individuals may seek "nonstatutory" review of a agency action that is "**ultra vires**."48/ In addition, when a federal official owes a plaintiff a "clear nondiscretionary duty,"49/ federal district courts50/ and appellate courts51/ may issue mandamus relief, which is an order compelling an official "to perform a duty owed to the plaintiff."52/ However, the remedy is to be invoked only in "extraordinary circumstances"53/ when "no adequate alternative remedy exists."54/ Finally, the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* recognized a common law cause of action against federal officers….

48/ *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 59 (1st Cir. 2007) ("The basic premise behind nonstatutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is **ultra vires**.") (quoting *R.I. Dep't of Envtl. Mgmt. v. United States,* 304 F.3d 31, 44 (1st Cir. 2002)); *R.I. Dep't of Envtl. Mgmt,* 304 F.3d at 42 ("As a general matter, there is no statute expressly creating a cause of action against federal officers for constitutional or federal statutory violations. Nevertheless, our courts have long recognized that federal officers may be sued in their official capacity for prospective injunctive relief to prevent ongoing or future infringements of federal rights. Such actions are based on the grant of general federal-question jurisdiction under 28 U.S.C. §1331 and the inherent equity

powers of the federal courts.") (citations omitted); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) ("If a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action.").

49/ *Heckler v. Ringer,* 466 U.S. 602, 616 (1984).

50/ 28 U.S.C. §1361 (authorizing mandamus relief against government officials and agencies but not the United States).

51/ Id. §1651(a).

52/ Id. §1361. Federal courts may also issue declaratory relief—a legal judgement stating the rights and obligation of relevant parties—under the Declaratory Judgement Act. 28 U.S.C. §2201.

53/ *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). 54 Barnhart v. Devine, 771 F.2d 1515, 1524 (D.C.Cir. 1985).
[. . . .]

[T]he Supreme Court has held that in suits brought under the APA, federal courts lack the power to require parties to exhaust their administrative remedies if no statute or agency rule requires such exhaustion.83

83/ *Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993).

From: ***Writers Guild v FCC*****,** 423 F. Supp. 1064 (USDC, CD CA, 1976):

First Amendment Claims.

The defendants' position that the FCC has exclusive jurisdiction to entertain the plaintiffs' constitutional claims presents an entirely different order of question. Although the parties are in dispute as to whether or not the First Amendment gives rise to a private cause of action for damages and whether or not the First Amendment affords a basis for declaratory or injunctive relief under the circumstances of this case, no one doubts that in an appropriate case that the First Amendment will support a private cause of action for declaratory and injunctive relief. "The inherent federal judicial power to enjoin threatened or continued violation of constitutional rights is beyond question." *Ackerman v. Columbia Broadcasting System, Inc., supra*, 301 F. Supp. at 633, *citing Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946). Most courts presented with constitutional claims against broadcasters have been willing to consider them on the merits without reference to the doctrine of exhaustion of remedies. *See Massachusetts Universalist Convention v. Hildreth & Rogers Co., supra*, 183 F.2d at 501; *McIntire v. Wm. Penn Broadcasting Co., supra*, 151 F.2d at 601; *Post v. Payton, supra*, 323 F. Supp. at 803-04; *Ackerman v. Columbia Broadcasting System, Inc., supra*, 301 F. Supp. at 633-34. *But see Maguire v. Post…*, 24 P&F Radio Reg.2d 2094 (D.C. Cir. 1972).

From: ***Bucks County Cable v. United States*** *(FCC)* (USDC, ED PA, 1969).

The FCC's "Memorandum Opinion and Order" adopted January 22, 1969, among other things, orders a hearing on the UHF stations' petitions for waiver. The order, however, cannot serve to deprive this Court of jurisdiction. (Grant County Deposit Bank v. McCampbell, et al., 194 F.2d 469, 472, 31 A.L.R.2d 909 (6th Cir. 1952).)….

The plaintiff is i*n the analogous situation as that presented by* ***Elmo Division of Drive-X Co. v. Dixon****,* 121 U.S.App.D.C. 113, 348 F.2d 342 (1965). *[[quoted below]]* …. In upholding the District Court's jurisdiction, the court stated:

> "We see no reason to bar District Court jurisdiction here, for relief in that court is appellant's only effective remedy … The prospect of ultimate appellate review of any final order issuing out of the new complaint proceeding is not adequate….

The court also states that "[statutory] provisions concerning review of agency action by the Court of Appeals do not in and of themselves, * * * preclude District Court jurisdiction …" At 343.

The Administrative Procedure Act provides for District Court jurisdiction in the kind of situation presented by this case. Section 702 provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The legal wrong suffered by plaintiff is the unconstitutional application …. discussed…below.

Section 703 of the Administrative Procedure Act provides:

> "The form of providing for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. * * *"

Plaintiff here seeks a declaratory judgment and preliminary injunction in the District Court.

Section 704 of the Administrative Procedure Act provides:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review."

In *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) the Supreme Court upheld the jurisdiction of the District Court in a pre-enforcement suit for a declaratory judgment and injunction. The Commissioner of Food and Drugs had issued new regulations which plaintiff claimed exceeded his authority. In commenting on Section 704 the court stated:

> "The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court

> has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. * * * the specific review provisions were designed to give an additional remedy and not to cut down more traditional channels of review. * * *" At 140-142, 87 S. Ct. at 1511, 1512.

Thus, the Administrative Procedure Act supplements the special statutory review procedures for final orders of the various agencies. Its review provisions utilize traditional equity actions for agency action not amounting to a final order, but which nonetheless directly affects plaintiff's rights. In interpreting "final agency action" found in Section 704, the Court states:

> "The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way. Thus in *Columbia Broadcasting System v. United States,* 316 U.S. 407, [62 S. Ct. 1194, 86 L. Ed. 1563,] a suit under the Urgent Deficiencies Act, 38 Stat. 219, this Court held reviewable a regulation of the Federal Communications Commission setting forth certain proscribed contractual arrangements between chain broadcasters and local stations. *

* *" At 149-150, 87 S. Ct. at 1516.

In *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir., 1961), the court upheld the District Court's jurisdiction in issuing an injunction against the National Labor Relations Board prohibiting the Board from delaying further its decision in the case. The court stated:

> "The 'final agency action' made reviewable under § 10(c) [§ 704] of the Administrative Procedure Act need not necessarily be read synonymous with 'a final order of the Board granting or denying in whole or in part the relief sought * * *' made reviewable under § 10(f) of the National Labor Relations Act. * * * When a party suffers a legal wrong from continuing agency delay and, as here, there is no other adequate administrative or judicial remedy, the delay is final agency action for which § 10 of the [A.P.A.] does provide an effective remedy."….

From: ***Elmo Div. of Drive-X Co. v. Dixon*** (DC Cir, 1965) (cited in *Bucks Co.* above):

> Statutory provisions concerning review of agency action by the Courts of Appeals do not in and of themselves… preclude District Court jurisdiction. *A.F. of L. v. NLRB*, 308 U.S. 401, 60 S. Ct. 300, 84 L. Ed. 347 (1940), makes this clear. There the Supreme Court held Wagner Act provisions for Court of Appeals review foreclosed appellate review of §9(c) certifications except as incidental to review of orders restraining unfair labor practices. The Court went on … that whether District Courts could "review" certification proceedings was another question… later resolved in *Leedom v. Kyne,* 358 U.S. 184, 3 L. Ed. 2d 210, 79 S. Ct. 180 (1958), discussed *infra*. [….]
>
> So proceeding, we see no reason to bar District Court jurisdiction here, for relief in that court is appellant's only effective remedy, as we will demonstrate. The prospect of ultimate appellate review of any final order issuing out of the new complaint proceeding is not adequate. [….]

We see no ground on which we can distinguish the present case from *B. F. Goodrich Co. v. FTC*, 93 U.S. App. D.C. 50, 208 F.2d 829 (1953), appeal after remand, 100 U.S. App. D.C. 58, 242 F.2d 31 (1957). That case sustained the jurisdiction of the District Court to enjoin enforcement of the Commission's Quantity-Limit Rule 203-1 on the ground that the Commission had promulgated the rule without first making the findings on which Congress had expressly conditioned its statutory grant of authority to make such rules. [2/] *Cf. Leedom v. Kyne,* 101 U.S. App. D.C. 398, 249 F.2d 490 (1957), aff'd, 358 U.S. 184, 3/ L. Ed. 2d 210, 79 S. Ct. 180 (1958) (District Court has jurisdiction where Board violates express condition of its authority to determine appropriate bargaining units); *Skinner & Eddy Corp. v. United States,* 249 U.S. 557, 63 L. Ed. 772, 39 S. Ct. 375 (1919) (Brandeis, J.) (District Court has jurisdiction where ICC permits new rate filing without hearing required by statute). [3]

2/ The decision was not premised, as the dissent implies, on the unavailability of judicial review at a later stage….

3/ *Skinner & Eddy* is especially pertinent…. The Supreme Court sustained District Court jurisdiction to enjoin the filing though the petitioner had not sought relief within the Commission, since the complaint alleged that the Commission had exceeded its powers ….

In *Goodrich, supra, Kyne, supra*, and *Skinner & Eddy, supra*, the agency's action violated express statutory conditions of its authority which were found to give rise to enforceable rights in the parties for whose protection they existed….

/ / /

Appendix 4

General description of a potential public-interest settlement framework
in an FCC rule §1.18 arbitration, indicated above

This is not an offer, does not involve any waivers or admissions, and is meant for potential compromise.

Concurrently:

(1) **Havens-Polaris** (and affiliates) would dismiss with prejudice all their claims (called the "Challenges" above) against MCLM-Choctaw (and affiliates; see 47 USC §§ 217 and 411) before the FCC regarding the MCLM Decisions; and related claims against the FCC.

If MCLM-Choctaw (and affiliates) do not dismiss with prejudice all of their claims (called the "MCLM Havens Challenges" above) before the FCC against Havens (or Havens-Polaris) or pursue any new claims against Havens or Polaris, then Havens-Polaris may re-file claims, and tolling would apply).

(2) **MCLM-Choctaw** would assign a relatively small percentage of total spectrum in the MCLM Licenses (held by MCLM prior to the FCC Decisions) and/or proceeds of sales thereof to or for purposes of the "Polaris Public Private Partnership" noted below, under current control of Havens (certain other parties and agents may also be involved).

(3) **The FCC** would:

(A) Issue to Havens-Polaris, for the Polaris Public Private Partnership, under FCC rules §§ 2.102 and 2.103 and/or other relevant rules and precedents, formal written authorization(s) for defined priority use of certain spectrum (some spectrum governed by the FCC and other adjacent spectrum governed by NTIA) currently not in use, and for which both the FCC and NTIA (and industry entities) have indicated little past and projected use, subject to agreements from the NTIA and some of its client Federal Agencies as to the NTIA-governed spectrum involved. Havens has met with NTIA and relevant Federal Agencies regarding these matters. The FCC authorization would give to Havens-Polaris a multi-year period of time to secure all needed final agreements and approvals of the relevant Federal Agencies and NTIA for purposes of the Polaris Public Private Partnership's use of the authorized spectrum.

(B) Issue rights to Havens for purposes of the Polaris Public Private Partnership, to obtain, in a given event, certain improvements (by waiver or other means) to licensed spectrum of licensee entities in which Havens currently holds shareholder-member (and other) interests. The given event would involve Havens or his assignee (Polaris or other entity) obtaining FCC-recognized control over the subject licensed spectrum. Havens believes these improvements would not reasonably be deemed to adversely affect operations of other licenses and licensees and would be within FCC precedents.

(4) **The FCC** would terminate and dismiss with prejudice all proceedings regarding the MCLM Decisions and the Challenges, and all interlocutory orders in those proceedings including but not limited to FCC 15M-14 (the "Terminated Matters") in a termination order that makes clear that there will be no residual effects for any purpose of the Terminated Matters; and

no recognition of, and reversal of, any ramifications of all Terminated Matters in any FCC licensing or other FCC matters.

(5) Other terms in accord with the above.

The "**Polaris Public Private Partnership**" indicated above involves:

(i) certain US federal agencies involved with radio signaling and communication networks for their own use, and to serve the public, such as the GPS system and affiliated systems, and the NTIA that governs spectrum of those agencies and networks (the "public" sector), and

(ii) the private nonprofit sector including projects of Havens and Polaris PNT PBC, and

(iii) the private for-profit sector including projects of Havens and Polaris PNT PBC,

and where:

- the entities in the three sectors under formal contracts substantially combine, coordinate and share radio spectrum and radio-network resources in multi-decades-long joint venture(s) or "partnership(s)," and

- the "public interest" as meant in the federal acts that establish and govern the FCC and those federal agencies is the priority, in the contract provisions and implementation. The scope is nationwide.

Certain new technologies involved may be useful by some US agencies worldwide.

Some aspects are under trade secret and other protections at this time.

/ / /

Endnote

Regarding the FCC "Ultra Vires Rule Change" ("UVRC") commenced to unlawfully award MCLM licenses in Auction 61 and then formulated and placed in governing FCC Auction publications of all subsequent auctions to this time, polluting all the auctions and resulting licenses: this UVRC is effectively admitted to by the Commission in its OSC HDO FCC 11-64, and Petitioners' challenges to this UVRC remain pending before the FCC, opposed by MCLM

Such "other reasons" include, for example, the following, which is not required for grant of the Request but is supportive:

The following involves some of the MCLM (and related persons') wrongdoing at issue in the OSC HDO FCC 11-64 that commenced proceeding 11-71 (that lead to proceeding 13-85), and FCC *ultra vires* actions first to unlawfully accommodate MCLM in Auction 61 and then to extend that *ultra vires* action to all auctions after Auction 61 to this day, polluting those auctions, all in violation of Congressional mandates in 47 USC §309(j) of the Communications Act. This extends the importance of Petitioners' case in the Challenges and court action that may be needed (in part indicated in Appendix 3 above).

The MCLM Decisions are also (other than noted above) based upon various other FCC decisions that are *ultra vires* and void, including the FCC's "ultra vires rule change" ("UVRC") that Petitioner Havens (et al.) presented in a writ to the United States Court of Appeal for the Ninth Circuit, in context of Auctions 61 and 87 (and all auctions after Auction 61) (the "UVRC Challenge").

The UVRC Challenge is pending before the FCC, and was and still is opposed by MCLM, which also, in that opposition, attacked Havens FCC-related character, speculatively citing to non-adjudicated court claims of others (some of whom hired MCLM counsel, and engage in other relations with MCLM shown in court records): this is part of the "MCLM Havens Challenges" defined above.

As shown in the UVRC Challenge, by the UVRC, FCC staff turned on its head—changed to near the opposite in purpose and effect—the relevant threshold auction qualification rules for small-company bidders and bidding credits. As shown, (i) the plain reading of the rules, and (ii) their meaning (in accord with the plain reading) explained by the Commission when adopting the rules, as part of the Commission implementing the mandates in 47 USC §309(j) of the Communications Act, and (iii) requirements of the controlling case precedents, include that

(1) *any* change in bidding credit size is impermissible, after the short-form auction-application deadline, *including going down* in bidder discount size, post auction, *after using false, higher-quality bidding credits against competitors in the auction to win high bids* as "MCLM" did (whatever "MCLM" actually is, if real controllers ever apply to the FCC in disclosure of and approval of the real parties in control), and

(2) any change in control in the applicant is also impermissible in the same auction time period, especially where the stated control was false as in the MCLM case by MCLM's eventual post-auction admissions and other uncontested evidence. In addition, the false applicant

certifications involved are also impermissible and are subject to 18 USC (federal criminal code) violations and sanctions as indicated in part on the application forms.

Against those actual rules, the FCC Auctions Division and eventually the Wireless Bureau implemented the UVRC (with no notice and comment in proper process under APA), for MCLM in Auction 61 and then continued that in all auctions thereafter, including by statements in the "auctions procedures" public notices.

/ / /

Certificate of Filing and Service

I, Warren C. Havens, certify that I have, on July 27, 2017:[*]

(1) Caused to be served, by placing into the USPS mail system with first-class postage affixed unless otherwise noted below, a copy of the foregoing filing, including any exhibits or attachments, to the following:

Robert J. Keller
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(2) Caused to be filed the foregoing filing as stated on the caption page, and thus, as I have been instructed, [**]provide notice and service to any party that has or may seek to participate in dockets 13-85 and 11-71 that extend to this filing, and the three interdependent FCC Orders, FCC 16-172, DA 17-26 and DA 17-450.

/s/

Warren Havens

[*] The mailed service copies being placed into a USPS drop-box today may be after business hours and thus may not be processed and postmarked by the USPS until the next business day.

[**] The FCC Office of General Counsel informed me regarding others' filings concerning MCLM relief proceedings that I was served in this fashion. I assume OCC does not apply a different standard to others. If OGC has a different standard, it can make that clear and public.